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In the Supreme Court of the United States

OCTOBER TERM, 1978

DANIEL FATICO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals affirmed without written opinion (Pet. App. 1a-2a).

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1978. The petition for a writ of certiorari was filed on November 22, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court correctly ruled that, in the circumstances of this case, the government was not required to disclose the name of an undercover FBI agent.

2. Whether the district court erred in refusing to instruct the jury that it could draw an adverse inference from the government's failure to produce the unidentified FBI agent.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of having conducted an illegal gambling business in violation of 18 U.S.C. 1955 and 2.[1] The court of appeals affirmed (Pet. App. 1a-2a).

The evidence at trial established that as a result of an investigation conducted by the FBI from about mid-September 1975 through December 12, 1975, it was discovered that petitioners and a number of other individuals managed and operated an illegal gambling business on the second floor of 5002 Church Avenue,

[1] Petitioner Fatico was sentenced to a three-year term of imprisonment. Petitioners Corozzo, Dellaratta, and Reese each received two-year suspended sentences and two years probation, of which six months are to be spent at a community treatment center. Petitioner Scida was sentenced to a two-year term, four months to be served in jail and the remainder on probation. Petitioner DeMaria received a three-year probationary sentence, nine months of which is to be served in a community treatment program. All six petitioners were acquitted of a related conspiracy charge (18 U.S.C. 371).

Brooklyn, New York. FBI Special Agent Paul Brana, operating in an undercover capacity, gained access to the gambling premises on six occasions during the latter part of 1975 (Tr. 34).[2] On the first three of these occasions he was introduced into the premises by another undercover FBI agent (Tr. 82-85).

On each of these six occasions, Agent Brana observed a large sophisticated gambling operation in progress. The gambling area was located behind two heavy locked doors and was guarded by a number of lookouts and doormen (Tr. 35-37). Operating under the guise of the Churchonian Social Club, the high-stakes dice game operated by petitioners and others attracted as many as 35 players per night (Tr. 39). The game was attended by gamblers from other boroughs of New York City and from New Jersey (Tr. 242, 297-298). The amount gambled on the average roll of the dice was two to four thousand dollars, and Brana observed as much as $15,000 gambled on a single roll (Tr. 47). Based upon these and other figures, an FBI agent who was qualified as an expert witness testified that in his opinion this gambling operation was a large and substantial one (Tr. 253-254).

The dice game, which was conducted on a specially marked table, was usually operated by two dealers, who paid and collected on the bets placed by the players (Tr. 45). The dealers were assisted by "stickmen," whose function was to collect the dice

[2] "Tr." refers to the trial transcript. "S.Tr." refers to the transcript of the sentencing proceedings, June 9, 1978.

after each throw and to keep the dice moving around the table from one player to the next (*ibid.*). Agent Brana observed petitioner Fatico working as a dealer on all six nights; Corozzo worked on four of those nights as a dealer, stickman and ladderman;[3] DeMaria was seen on four nights—three as a dealer and once as a stickman; Reese worked as a cashier on all six nights; Dellaratta was seen twice, once as a dealer and once as a stickman; and Scida was observed on five of those six nights working as a stickman (Tr. 49-53). Brana never observed any of the defendants participate in the game as a player or gambler (Tr. 54).

On December 11, 1975, a United States magistrate issued search warrants for the above-mentioned premises as well as for the persons of petitioners Fatico, Corozzo, DeMaria, and Reese. The search warrant affidavit of FBI Agent Nalley was based on the observations made by agents during the surveillance of the premises as well as information obtained from two confidential informants. FBI agents executed the search warrants on December 12, 1975; they were able to do so only after breaking two heavy protective doors with a battering ram (Tr. 202-204). The agents found approximately 40 people present

[3] The function of the "stickman," as mentioned, was to collect the dice after each throw and to keep the dice moving from one player to the next. The "ladderman" observed the conduct of the game from elevated platforms located at either end of the rectangular gambling table. The cashier sat at a side table with a cash box from which he cashed in gambling chips for players (Tr. 45-46).

in the gambling premises (Tr. 155). Among the gambling paraphernalia seized were quantities of gambling chips, dice, a metal cash box, a red warning light and the gambling table (Tr. 220-224). Furthermore, approximately $1,000 in cash was found on the person of petitioner Corozzo (Tr. 204), about $3,000 in cash was found on petitioner Fatico (Tr. 214), and the search of petitioner Reese produced about $8,000 (Tr. 218).

ARGUMENT

1. Special Agent Brana was introduced into the gambling operation by another undercover FBI agent who had earlier gained entry with the assistance of a confidential informant. Because of the close association between them, the government feared the revelation of the undercover agent's identity would necessarily expose the informant; it therefore objected to defense efforts at trial to compel disclosure.[4] The district court agreed that, under the circumstances here, the government was privileged to withhold the agent's identity (Tr. 70-71, 127-133, 276; S.Tr. 18-20). This ruling was correct and involves no issue meriting review by this Court.

[4] Although petitioners assert (Pet. 4) that the government initially represented that a confidential informant had introduced Agent Brana into the gambling premises, actually the ground for objection was that disclosure might endanger a confidential informant (Tr. 70-71). The factual situation was subsequently clarified (Tr. 130-131). The informant privilege encompasses a government agent acting in an undercover capacity. *United States* v. *Wright*, 468 F.2d 1184, 1187 (6th Cir.), cert. denied, 412 U.S. 938 (1972).

Roviaro v. *United States*, 353 U.S. 53, 59 (1957), recognizes a governmental privilege not to reveal the identity of active informants who give it information concerning violations of the law. At the same time, however, the Court recognized in *Roviaro* that "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way" (*id.* at 60-61; footnote omitted). On the facts of *Roviaro*, the balance between "the public interest in protecting the flow of information against the individual's right to prepare his defense" fell on the side of disclosure. *Id.* at 62.

This, however, is not a case like *Roviaro*, where the " 'informer was the sole participant, other than the accused, in the transaction charged,' " or where his testimony " 'might have disclosed an entrapment' " or have relevance on the issue of "identity." *McCray* v. *Illinois*, 386 U.S. 300, 310-311 (1967). Petitioners merely hoped that the informant and the other FBI agent would impeach the testifying agent on a collateral point, concerning who introduced him to the illegal gambling operation in the first place. Petitioners do not claim that the undisclosed witness could have testified with respect to their acts. Petitioners had many other criminal avenues of cross-examination and rebuttal to challenge Agent Brana's credibility or other elements of the prosecution's case.

The *Roviaro* test requires that the "determination as to whether identification of an informer is necessary for a fair disposition of a defendant's case * * * [be] left to the trial court's informed discretion." *United States* v. *Van Orsdell*, 521 F.2d 1323, 1326 (2d Cir. 1975), cert. denied, 423 U.S. 1059 (1976); *United States* v. *Soles*, 482 F.2d 105, 109 (2d Cir.), cert. denied, 414 U.S. 1027 (1973). In this case, the district court's determination not to require disclosure of the FBI agent's identity was a proper exercise of that discretion based upon the facts and circumstances presented. As the court stated during the sentencing proceeding, "[i]f there was any sense of unfairness, I would stop it, but I didn't feel in the exercise of my discretion that you were really placed at any substantial disadvantage" (S.Tr. 18-19).

2. Petitioners argue (Pet. 9-10) that the district court erred in refusing to instruct the jury that it could draw an inference that the testimony of the undisclosed and uncalled FBI agent would have been unfavorable to the government. Since the trial court appropriately determined that there was good cause for not disclosing the undercover agent's identity in order to protect an informant, there was no basis for a missing-witness charge. This is not a case of an unexplained failure to produce a material witness within the government's control. There *was* an explanation for not producing the witness, an explanation the court accepted as compelling. It has been consistently ruled in cases involving informants that, because there is good cause for non-disclosure, no "adverse inference" instruction is warranted. See, *e.g.*, *Burgess* v. *United States*, 440 F.2d 226 (D.C.

Cir. 1970); *United States* v. *Peterson*, 424 F.2d 1357 (7th Cir.), cert. denied, 400 U.S. 958 (1970).

The instruction that the court did give, both during Agent Brana's testimony and in the final charge to the jury, was free of error. During the testimony and instructions, the court advised the jury that the government's assertion of privilege had placed the defense at a disadvantage (Tr. 71, 134, 376). Although petitioners now complain that such remarks compound the supposed error, they never voiced such an objection below; in fact, defense counsel expressed satisfaction with these comments (Tr. 71). Furthermore, defense counsel was allowed to comment freely during summation on the fact that the undercover agent and the informant were not called as government witnesses (Tr. 321-322).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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